***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

ORIGINAL

# 74-2272

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IN THE

## United States Court of Appeals

FOR THE SECOND CIRCUIT

NO. 74-2272

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

—against—

ANTHONY LA VECCHIA, EDWARD BOGAN, HERBERT KURSHENOFF and NICHOLAS ANDRIOTIS,

*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

# APPELLANTS ANTHONY LA VECCHIA'S AND EDWARD BOGAN'S BRIEF


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IN THE

UNITED STATES COURT OF APPEALS

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No. 74 - 2272

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ANTHONY LA VECCHIA and EDWARD BOGAN,

Defendants-Appellants.

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# BRIEF FOR APPELLANTS ANTHONY LA VECCHIA AND EDWARD BOGAN

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## Preliminary Statement

The Appellant, ANTHONY LA VECCHIA, appeals from a Judgment of Conviction in the United States District Court for the Eastern District of New York (Judd, J.), adjudging him guilty of violating the Federal Counterfeiting statutes, Title 18, United States Code, Sections 472 and 473 and conspiracy to

violate those laws in violation of Title 18, United States Code, Section 371. As a result of this conviction, the Appellant was sentenced to the custody of the Attorney General or his duly authorized representative for a period of four (4) years on each count, the terms to run concurrently. In addition, the Appellant, LA VECCHIA, was fined in the amount of $5,000.00.

The Appellant, EDWARD BOGAN, similarly appeals from a Judgment of Conviction in the United States District Court for the Eastern District of New York which also adjudged him guilty of conspiracy and a substantive violation of the Federal Counterfeiting statutes. As his co-Appellant, BOGAN was sentenced to concurrent terms of four (4) years on each count. Both LA VECCHIA and BOGAN are presently at liberty on bail pending appeal.

The Indictment, docketed below as No. 73 CR 305, charged the Appellant, LA VECCHIA, with five substantive counts of either sale or possession of counterfeit monies (counts one, two, seven, eight and nine) in addition to the conspiracy (count twelve).[1] The Appellant, BOGAN, was named in one substantive count (count eight) and the conspiracy. The Indictment

appears on page 11 of the Appellants' Joint Appendix.

## STATEMENT OF THE FACTS

The Government's proof focused, in the first instance, on an alleged sale of counterfeit money with a face value of $25,000.00 by the Appellants LA VECCHIA and BOGAN to one John Mc Millan, a former dealer in counterfeit currency turned informant.[2] Using the alleged sale of February 15th, 1973 as a point of embarkation, the Government, through testimonial flashbacks, attempted to prove previous sales and, more significantly, a broader conspiracy to distribute counterfeit currency dating back to June of 1971.[3]

John Simon, a federal agent employed by the United States Secret Service, had on February 15th, 1973 "staked out"

[1]Count nine was dismissed at the end of the Government's case because the Government had failed to establish venue in the Eastern District of New York. (T 964)

[2]In addition to his counterfeiting activities, Mc Millan admitted to have been, inter alia, a thief, burglar, robber and narcotics trafficker. (T 518 - 523)

[3]As will be seen, of the Appellants, LA VECCHIA and BOGAN, Mc Millan is alleged to have only had direct contact with LA VECCHIA. The Government's case against BOGAN, although apparently convincing, was circumstantial.

the Beacon Discount Sales located at 125 East 18th Street in Manhattan. At approximately 2:25 on that afternoon, the agent observed the arrival of John Mc Millan who met with the Appellant, LA VECCHIA. (T 94)[4] Approximately one hour later, the agent saw LA VECCHIA leave the 18th Street location in what was described as a 1967 blue Chrysler. (T 102) Minutes later, the Appellant, BOGAN, arrived at the Beacon Discount location. (T 102)[5] Operating in response to a covert transmission by Mc Millan on an electronic device worn on his person, Agent Simon followed BOGAN to the area of Park Avenue South and East 18th Street where BOGAN was seen conversing with LA VECCHIA in LA VECCHIA's car for approximately three to five minutes. (T 106 - 107)

The remainder of Simon's testimony related to a search pursuant to a warrant of premises located at 270 Lafayette

[4]References to the trial transcript are introduced by the letter "T" while the letter "A" refers to the Appellants' Joint Appendix.

[5]So as not to confuse the reader, the Government proved that there was another "Beacon" operation at 270 Lafayette Street in Manhattan. These premises, leased by the Appellant, BOGAN, were found, after a search, to contain large quantities of counterfeit currency in addition to photo offset plates used to manufacture the bogus money. The actual connection between the two "Beacon" operations was speculative.

Street. (T 108) According to the building's directory, the loft at 270 Lafayette was occuppied by "Beacon Printing." Additionally, the agent noted that one of the windows which faced the street contained a sign which said "Beacon Discount." (T 109) The search of the loft area produced printing plates, negatives and counterfeit Federal Reserve Notes, both cut and uncut, in the face amount of $420,000. (T 119) It was also noted, and introduced through the use of photographs, that printing presses were located on the premises. (T 160 - 163)

Dario Marquez, another Secret Service agent who participated in the surveillance and arrest of the Appellants on February 15th, 1973, testified that nine days prior to the arrest he went to the "Beacon" loft at 270 Lafayette Street in an undercover capacity and determined that there were printing presses on the premises. (T 200) On February 15th, Agent Marquez recorded the serial numbers of genuine currency which was advanced by the Secret Service to John Mc Millan in order to complete the alleged purchase of counterfeit from LA VECCHIA. (T 201)

In this multi-subject surveillance of February 15th, Agent Louis Caputo was assigned to observe the vicinity of 270

Lafayette Street. (T 214 - 215) At approximately 5:05 P.M. on the afternoon of the 15th, Caputo saw LA VECCHIA park his vehicle across the street from 270 Lafayette and enter the premises. (T 215) Approximately five minutes later, LA VECCHIA came out of the building, re-entered his vehicle and began to drive in a northerly direction. (T 216)

Continuing to establish the factual setting to be later sewn together through Mc Millan's testimony, the Government next called Special Agent Dennis Satterlee who kept watch of the East 18th Street location on February 15th. On that afternoon, Satterlee observed both LA VECCHIA and BOGAN in the vicinity of the Beacon Discount store. (T 227) In fact, Satterlee later placed LA VECCHIA under arrest at those premises. (T 229) Searching LA VECCHIA's person, the agent discovered "approximately three to four thousand dollars" in genuine currency and automobile keys. Both of these items were seized. (T 230)

Evidencing a seemingly endless supply of manpower, Special Agent Jeffrey Kierstead testified that shortly prior to LA VECCHIA's arrest, the Appellant was seen to approach his vehicle and open the trunk. (T 247) One of Kierstead's brother agents, Daniel Mc Intosh, also on the 18th Street surveillance

detail, testified that he was given a set of car keys by Agent Crovatto and without a warrant searched the Chrysler which LA VECCHIA drove, at that time parked "around the corner from Beacon Discount." (T 257 - 258) In the trunk of the car, the agents found $2,450.00 in genuine currency which was later identified as the pre-recorded monies advanced to Mc Millan. (T 258 - 259)

With the testimony of Secret Service Agent Joseph Coppola, the jury's attention was drawn to a purchase of counterfeit currency made by the agent in an undercover capacity during the summer of 1971. (T 263) The counterfeit monies were sold to the agent by an individual named Albert Setford who used the alias "Spike". (T 263) The counterfeit purchased was identified at trial by Agent Coppola and marked as Government's Exhibit 40. (T 264)[6] Agent Coppola then gave a detailed account of the manner in which the counterfeit was purchased from Setford. (T 269) His testimony demonstrated no direct involvement with either of the Appellants.

[6]To avoid suspense, Government Exhibit 40, as other Exhibits which contained counterfeit bought on subsequent occasions, was allegedly made from the same photo offset plates which were seized at 270 Lafayette Street.

Again, on September 6th, 1972, Coppola, in an undercover capacity, purchased counterfeit from one Dominick Russo. (T 272 - 273) This counterfeit, marked as Government's Exhibit 41, was also tied to the plates seized at 270 Lafayette Street. With regard to this sale, the agent gave a detailed account of the purchase from Russo, Russo's arrest and his ultimate role as a Government informant. (T 273 - 282) After Russo was arrested in December of 1972, the defendant-informant surrendered a quantity of counterfeit, marked as Government's Exhibit 42, which was similarly connected to the plates seized at 270 Lafayette Street.[7] It was further established that Government Exhibits 43 and 44 contained counterfeit which could be found to have been produced by the plates in issue and that these monies were purchased in August and September of 1973 from one Philip Martino, another alleged co-conspirator. (T 291 - 294) The same comparison was made with Government Exhibit 45

[7]These and other monies were connected through the expert testimony of Agent Coppola who pointed out imperfections or defects which appeared on each of the exhibits and that serial numbers on the bills were common to all exhibits. (T 320 - 324, 349) Although the agent was unable to state definitively that the plates produced the exhibits, there was a factual basis on which the jury could make such a finding. (T 353)

which contained the money allegedly purchased from LA VECCHIA on February 15th, 1973. (T 297)

Dominick Russo, who became a cooperating witness after being indicted for selling counterfeit to Agent Coppola, testified that in the summer of 1971, he received counterfeit monies from co-conspirators Setford and Evangelista. (T 376) Also, in 1971, Russo purchased counterfeit from John Mc Millan which in turn was given to Philip Martino and the defendant, Herbert Kurshenoff. (T 399 - 402) After samples were examined, a substantial quantity of counterfeit was allegedly distributed to both Kurshenoff and Martino. (T 404 - 405) Russo also testified to an alleged sale to the defendant Nicholas Andriotis. (T 412) Although the witness Russo neither met nor ever saw LA VECCHIA or BOGAN, a considerable portion of the trial was devoted to deals and sales of this counterfeit which ultimately filtered to Government agents in their undercover capacity as buyers.

The Government's principal witness at trial was John Mc Millan, whose testimony was used to orient the piecemeal observations and transactions previously testified to by the agents and Russo. Mc Millan, after recounting a virtual life

of crime, testified that he knew ANTHONY LA VECCHIA since 1968. (T 534) Mc Millan was also acquainted with co-conspirators Setford, Evangelista, Philip Martino and the witness Russo. (T 536 - 537) Mc Millan then described a sale of counterfeit to Evangelista in the summer of 1971 and asserted that the counterfeit had been obtained from ANTHONY LA VECCHIA. (T 538 - 544) On this occasion, it was alleged that some $300,000 in counterfeit was obtained from LA VECCHIA with a portion being sold by Mc Millan to Russo. (T 547) In addition to Evangelista, Setford and Russo, a portion of the counterfeit was sold off to other persons not named in the Indictment. (T 547) Mc Millan alleged that the proceeds of these sales went directly to ANTHONY LA VECCHIA who had advanced the counterfeit on consignment. (T 550)

In 1972, Mc Millan again became active in the counterfeit money market. In June of that year, Russo and Mc Millan, apparently in an enterprising mood, decided to "sell some more counterfeit money." (T 560) Mc Millan then described negotiations with LA VECCHIA, his alleged source. (T 561) Finally, Mc Millan testified that he received $25,000 in bogus currency in LA VECCHIA's home. (T 562) Mc Millan then described the

repackaging of the monies for sale to Martino and Kurshenoff. (T 563 - 564) After paying for this order, Mc Millan testified that he took another $25,000 from LA VECCHIA on consignment. (T 566) The counterfeit was again picked up at LA VECCHIA's home. (T 566) The details of this purchase are particularly relevant to the Appellant, BOGAN. According to Mc Millan, upon arrival at LA VECCHIA's home, he was told that there would be a delay as the package had not yet arrived. (T 567) Approximately one-half hour after Mc Millan's arrival, LA VECCHIA went into another room and spoke to an individual not seen by Mc Millan. (T 568) Although he did not listen to the substance of the conversation, Mc Millan testified that he heard the voices in the next room. (T 568 - 569) Immediately after the unidentified person left the house, LA VECCHIA brought in a package containing $25,000 in counterfeit money. (T 569) Mc Millan then testified to a similar pattern of distribution and payment to LA VECCHIA. (T 569 - 572)

Following this deal, Mc Millan related that on still another occasion he obtained $100,000 worth of counterfeit from LA VECCHIA. (T 572 - 574) With regard to this transaction, Mc Millan testified that a portion of the counterfeit was to be sold to the defendant Andriotis. (T 575)

On January 12th, 1973, Mc Millan was arrested and thereafter cooperated with the Secret Service. (T 576 - 577) Acting in accordance with instructions from the agents, Mc Millan met with LA VECCHIA on February 13th, 1973 and, according to his testimony, negotiated the purchase of another $25,000 in counterfeit.

Pursuant to the alleged discussions between Mc Millan and LA VECCHIA, the counterfeit was to be picked up by Mc Millan two days later on February 15th. As was made clear by earlier testimony, federal agents were well prepared to smash what they then thought to be the counterfeit ring on February 15th. Mc Millan was outfitted with an electronic transmitter and given the pre-recorded $2,500.00 to make the purchase. (T 580 - 581)[8] Following an initial conversation with LA VECCHIA, Mc Millan met the Appellant, BOGAN, who inquired as to LA VECCHIA's whereabouts. On the basis of this brief inquiry, Mc Millan tentatively identified BOGAN's voice as that which he overheard in LA VECCHIA's house when an earlier counterfeit purchase had

[8]A partial transcript of the electronically recorded conversation appears at p.594 of the trial transcript.

been delivered in 1972. (T 599) Shortly thereafter, BOGAN left the area and LA VECCHIA reappeared. Mc Millan then got into LA VECCHIA's car and was given the key to a locker in the Pennsylvania Railroad Station in exchange for the $2,500 in genuine currency. Ten minutes later, Mc Millan left LA VECCHIA and joined Secret Service Agent Kramer who accompanied him to Penn Station and the locker which was found to contain the $25,000 in counterfeit money. (T 600) Mc Millan testified on cross-examination that he never participated in any counterfeit sales with the Appellant, BOGAN. (T 716)

Mc Millan's testimony was followed by the continued direct testimony of Special Agent Ronald Kramer. Kramer described the undercover purchase of counterfeit from Philip Martino in August and September of 1972. (T 801 - 802) Martino was arrested on September 6th, 1972 and agreed to cooperate with the Government. (T 801) With regard to the arrest of the Appellant, LA VECCHIA, Kramer testified that, although there were problems with the tape recorder, he overheard conversation and made surveillance which substantially corroborated the testimony of Mc Millan as to February 13th and 15th. (T 816 - 824) Kramer was also the agent who compared the $2,450 seized in the trunk of the car driven by LA VECCHIA to

the pre-recorded list of serial numbers earlier referred to. (T 828) By stipulation, it was established that the Appellant, BOGAN, had leased the premises at 270 Lafayette Street since 1968 but further, that from June, 1971 through February 15th, 1973, the alleged period of the conspiracy, BOGAN sub-leased space on those premises to three other printing companies. (T 834)

The Government's direct case concluded with the testimony of Robert Ball, a fingerprint specialist employed by the United States Secret Service. In essence, Ball testified that BOGAN's fingerprints were found on a photo offset plate and several other of the exhibits including some of the counterfeit currency. (A 196 - 197)

## STATUTES INVOLVED

Title 18, United States Code, Section 371, states in pertinent part, as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 472, states in pertinent part, as follows:

> "Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more thant $5,000 or imprisoned not more than fifteen years, or both."

Title 18, United States Code, Section 473, states in pertinent part, as follows:

> "Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

## QUESTIONS PRESENTED

1. Whether the Trial Court's inaccurate summary of the testimony and comments in his charge to the jury, not based on evidence in the record and which were properly excepted to, constitute reversible error?

2. Whether the warrantless search of the Appellant LA VECCHIA's automobile, where exigent circumstances were absent

and it was practicable to obtain a warrant, violated Appellant's right to be free from unreasonable search and seizure?

3. Whether the Government's proof of multiple conspiracies rather than the single conspiracy charged in the Indictment was prejudicial to the Appellants, BOGAN and LA VECCHIA, thereby constituting reversible error?

4. Whether the Trial Court should have suppressed the evidence seized at 270 Lafayette Street pursuant to a search warrant because of a lack of probable cause and material misrepresentations in the affidavit in support of the request for that warrant?

## POINT I

### THE TRIAL COURT'S INSTRUCTIONS TO THE JURY CONTAINED UNFAIR AND UNWARRANTED COMMENTS WHICH WENT BEYOND THE EVIDENCE IN THE CASE; IN LIGHT OF TRIAL COUNSEL'S SPECIFIC EXCEPTIONS, REVERSAL IS WARRANTED.

Although last in chronological sequence, Appellants ANTHONY LA VECCHIA's and EDWARD BOGAN's initial claim of error on appeal is addressed to the Trial Court's charge. In giving his final instructions to the jury, the Trial Court exercised his right to make specific comment on the evidence presented

at trial. It has long been established that a Federal Trial Court may

> "...assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination."

QUERCIA v. UNITED STATES, 289 U.S. 466 (1933); UNITED STATES v. PHILADELPHIA & READING R.R. CO., 123 U.S. 113 (1887). This inherent authority, however, is not without certain caveats. In QUERCIA v. UNITED STATES (SUPRA), the Supreme Court cautioned that a Federal Judge

> "...may analyze and dissect the evidence, but he may not either distort it or add to it."

This obvious limitation was articulated in recognition of the inestimable influence which a Trial Judge casts upon a jury. As stated in the October, 1894 term of the United States Supreme Court:

> "It is obvious that under any system of jury trial, the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling."

STARR v. UNITED STATES, 153 U.S. 614 (1894).

In the instant case, both Appellants contend that the Trial Court overstepped the parameters of the applicable safeguards in more than one instance.

As developed in the Statement of the Facts, one of the most significant aspects of the Government's circumstantial case against the Appellant, BOGAN, surfaced in the testimony of Robert L. Ball, the Secret Service fingerprint specialist who established that BOGAN's prints were discovered on some of the counterfeit bills and printing paraphernalia found at 270 Lafayette Street. (T 891ff) On cross-examination of the witness Ball, counsel sought to establish that BOGAN's prints were found on only a small fraction of the materials present at 270 Lafayette Street and, further, drew attention to the fact that anyone, including federal agents who touched the materials at any time, might have left a telltale print. (A 214 - 215) Moreover, and perhaps more significantly, BOGAN's trial counsel elicited the fact that there were "several latent prints on the counterfeit bills which the expert could not identify." (A 219 - 220)

In final argument to the jury, both LA VECCHIA's and BOGAN's trial counsel spoke to the issue of the fingerprints.

LA VECCHIA's counsel noted that although he was alleged to be the source of all the counterfeit monies in question, there was "not a fingerprint on anything that Mr. La Vecchia touched." Further, with reference to BOGAN, counsel rhetorically asked "How come Bogan's prints aren't all over those boxes? What did he do? Did he push them with his feet?" (A 291) Then, on the basis of the evidence presented, counsel suggested a reasonable inference which would possibly explain why BOGAN's prints appeared in just a few instances on the counterfeit and related printing materials.

> "MR. LA ROSSA: Now let me tell you something. Don't be suckered by this because those of us that have never had problems with the law, in a situation of authority, when someone says, 'you take that, please' - would you - '...and tell me whether you recognize it,' tell me whether you'd take that from a person if he was a secret service agent, you knew he had a weapon, you knew you were in custody, and let me tell you something, sir, odds to dollars, your fingerprints are on those bills, now. Who - [9]

[9]At this point in summation, trial counsel physically handed a quantity of counterfeit bills to a member of the jury in an attempt to show that fingerprints may be left in a situation not necessarily related to the illegal possession or sale of counterfeit currency.

THE COURT: I don't thing there is any evidence to sustain that statement, Mr. La Rossa.

MR. LA ROSSA: I beg your pardon?

THE COURT: I don't think there is any evidence -

MR LA ROSSA: Nothing but a logical argument from the facts.

THE COURT: All right." (A 291)

More pointedly, BOGAN's trial counsel, in a similarly rhetorical fashion, asked:

"But when were the prints made?

That he can tell us, whether they were made on the evening of February 15th, or whether they were made when the money was printed.

He doesn't know and we don't know. Now, I ask you, isn't it reasonable to believe that on the night of February 15th, when we know through the Government's witnesses that this money was at the secret service and we know through the Government's witnesses that Mr. Bogan was at secret service; isn't it reasonable to believe that at that time he touched this money?"

* * * *

"Now, if you remember the testimony, Mr. Bogan's prints appear on one plate, not on two, not on four, not on all eighteen, but on one plate." (A 226)

Excoriating the Government's proof, counsel stated that:

> "Now, wouldn't it be easy for the government to prove that it didn't happen that way on February 15th, wouldn't it have been easy for the agent who testified that during the course of the evening of February 15th, someone always had Mr. Bogan in custody, and he was in custody at that time, he was under arrest, and at no time when he was there on February 15th, no agent ever showed him this money, or the plates or the negatives or the powder?" (A 227)

Dwelling on what appeared to be his client's most serious problem in the case, counsel argued:

> "Why aren't there prints on all the plates; why just one out of eighteen?
>
> Why aren't these prints on all the negatives?
>
> Why aren't his prints on the cuttings?
>
> And what about the money, what about the money that he printed. Why aren't there prints on the money?" (A 229)

And with regard to Ball's testimony concerning other unidentified latent prints which were discovered, counsel stated:[10]

> "And talking about prints, whose are the seven unidentified fingerprints on this money that Mr. Ball testified to?

[10]The trial transcript reflects Mr. Ball as stating that there were "several latent prints" which were unidentified. (T 931) However, both the Court and counsel referred to this testimony as disclosing <u>seven</u> latent prints. (A 233, 390)

> Who are they? Someone who worked for any of these other printing companies, someone we never heard about, that counterfeiter? We will never know." (A 233)

As was later done by his brother counsel, BOGAN's attorney handed a portion of the counterfeit to the jury. Upon retrieving the exhibit, counsel reminded the jury that:

> "By the way, all of this money that you looked at, when you handed it back to me, your prints are on it, my prints are on it." (A 235)

With regard to this very critical issue, the Trial Court in an ostensible comment on the evidence, attacked and virtually destroyed counsel's arguments by stating that:

> "I did not hear any testimony about what is necessary to produce clear fingerprints but I was impressed by the fact that after examining all this counterfeit money Mr. Ball found only seven latent prints besides those that were on, so apparently fingerprints do not show up every time." (A 390 - 391)

It is here submitted that this gratuitous observation not only may have contained grievous factual error, but certainly went well beyond the scope of a Trial Judge's fair comment on the evidence. Here, in effect, the Court picked up where the prosecutor left off in his summation in an attempt to persuade

the jury not to accept inferences suggested by the defense. In so doing, the Court clearly appeared as a "partisan for the prosecution," a prohibited tactic. UNITED STATES v. CISNEROS, 491 F.2d 1068 (5th Cir., 1974).

Trial counsel took specific exception to this statement:

> "As I recall, Your Honor said that you were impressed by the fingerprint testimony and that there were only 7 latent prints, and you also said, apparently fingerprints don't show up all the time.
>
> As Your Honor knows, that was the highlight and the keystone of my defense.
>
> Mr. De Petris never even mentioned it in his summation, and I believe Your Honor did it for him.
>
> There is no testimony that seven individual prints were on these bills." (A 403)

After colloquy:

> "Your Honor said that there were only seven latent prints on the bills. As I recall the testimony of Mr. Ball, he said that on these bills, there were only seven latent prints, meaning seven different types of fingerprints, not seven individual prints, which is very important, Judge.
>
> And Your Honor said seven individual prints, seven latents (sic) prints. That's the basis of my exception with regard to the fingerprint testimony." (A 404 - 405)

Recently, in UNITED STATES v. PINTO, --- F.2d --- (2nd Cir., July 31st, 1974) sl op. p.5089, this Court categorically condemned a Trial Court's reference to facts not supported by the testimony. Similar to the factual misstatement contained in PINTO, the Trial Court in the instant case gave the jury a new interpretation of testimony adduced at trial. Although this record is not terribly clear on the point, it would appear that the Judge's observation that there were seven other prints rather than prints belonging to seven or several other persons, is unsupported by Ball's testimony.

Moreover, as in the PINTO case, the Trial Court also "set-up and then knocked down a species of 'straw-man' ... uncalled for by the record." Counsel for the Appellant, LA VECCHIA, spent a great deal of his summation attacking the credibility of the accomplice-witness, Mc Millan. The summation reflected the exacting cross-examination which had earlier sought to discredit the witness. During this cross-examination, one attack on Mc Millan's credibility concerned a drug trafficking deal with Vincent Pappa, reference to whom was set in an organized crime context. (T 644 - 646) In his closing argument to the jury, counsel suggested that if Mc Millan were to fabricate testimony in order to extricate himself from his

own criminal involvement, it would be more comfortable to involve businessmen such as LA VECCHIA and BOGAN as opposed to organized crime figures. (A 284 - 287) In apparent reference to this entirely permissible and reasonable argument, the Trial Court proceeded to set up the following "straw-man" and then knock it down:

> "There was a suggestion by the defendants that you should consider the fact that the defendants are businessmen and the witnesses are criminals. One of the problems federal courts have in trying to see that we do not deal with white-collar criminals on a different basis from the crimes of working men." (A 383 - 384)

It is unmistakeably clear that Appellants' argument in no way suggested that the defendants at bar should receive any more favorable treatment because of their "businessmen" status. To treat counsel's argument in this context was categorically uncalled for by the record. And unlike PINTO, specific exception was taken. Following the Court's charge, counsel stated that:

> "Your comment to the jury with respect to white collar businessmen and white collar criminals took out of context the argument in which the businessman theme was given to the jury.
>
> No one argued to them because they were

businessmen they should be treated differently or acquitted. The argument was that the witness would be more apt to use four businessmen as potentials in this case instead of the hoodlums that he sat down with." (A 398)

The fact that the Trial Court misinterpreted counsel's argument is further evidenced by colloquy with other counsel. The Court there stated that:

"THE COURT: He [Mr. La Rossa] said these are businessmen, they are not hoodlums, and to acquit them.

MR. LA ROSSA: That's not what I said.

THE COURT: Well, it's the import of it.

MR. LA ROSSA: No, if it please the Court, it's not, most respectfully, I think either you misunderstood me or misheard."

THE COURT: All right." (A 407)

This allegation of unwarranted and improper comment was immediately followed by yet another statement which the Appellants claim to be error. Concluding the "businessman" theme, the Court stated that:

"If these defendants are not guilty you should acquit them. If you find they are guilty beyond a reasonable doubt, the fact that they are business men is no excuse and you might consider that for all that

> counsel said about Mr. Mc Millan's bad character. Mr. La Vecchia talked with him for several hours on February 13th and 15th although you are asked to believe it had nothing to do with counterfeit, we have some testimony about fingerprints."

First, it must be noted that there was no evidence of LA VECCHIA's fingerprints being found on any of the counterfeit or related materials. Second, and more importantly, the Trial Court exceeded the guidelines established in QUERCIA v. UNITED STATES (SUPRA) by placing himself in the role of prosecutor. This argument, it is submitted, would have been questionable if included in the Government attorney's summation. In the Court's charge, it was devastating. It went well beyond fair comment on the evidence and was nothing less than argument to support a verdict of guilt. Plainly stated, the Trial Court assisted the prosecutor by rebutting arguments suggested by the defense. Specific exception was taken:

> "I think your comment that 'La Vecchia spent four hours with Mc Millan, if he were that kind of man, you should take that into consideration,' is unfair comment." (T 1217)

In sum, the Trial Court in this case lent himself to the

prosecution by advancing arguments in support of the Government's position. In terms of prejudice, it is submitted, these comments exceeded the impact of the Court's remarks in UNITED STATES v. PINTO (SUPRA). And as pointed out in each instance, specific exception was taken. On the basis of these instructions alone, it is respectfully submitted, reversal is required.

## POINT II

### THE WARRANTLESS SEARCH OF THE APPELLANT LA VECCHIA'S AUTOMOBILE WAS AN UNREASONABLE INTRUSION WITHIN THE PURVIEW OF THE FOURTH AMENDMENT; THE APPELLANT'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

Once again, this Court is called upon to determine whether a warrantless search of an automobile was Constitutionally permissible. Prior to trial, an evidentiary hearing was held on the Appellant's Motion to suppress the $2,400 in pre-recorded Government funds which had been advanced to John Mc Millan for the purchase of the counterfeit.[11] The Government, in its effort to justify the absence of a search warrant, relied

[11] Fifty dollars of the original $2,500 was allegedly found on the Appellant LA VECCHIA's person at the time of his arrest.

upon the testimony of five Secret Service agents who participated in the East 18th Street surveillance, arrest and subsequent search.

Ronald Kramer, who also testified at trial, was the agent who actually delivered the pre-recorded money to Mc Millan. (A 77) He then conducted surveillance on the 15th of February in the vicinity of the Beacon Discount store on East 18th Street. (A 77 - 78) Kramer observed Mc Millan as he spoke to LA VECCHIA in front of 125 East 18th Street and then saw LA VECCHIA leave the area. From brother agents Kramer learned that LA VECCHIA proceeded to 270 Lafayette Street wherein moments later, apparently due to what the agents surmised as confusion, BOGAN arrived at the East 18th Street location. (A 80) Later, Kramer rejoined Mc Millan and went to Penn Station where the $25,000 in counterfeit was found in a locker, the key to which was allegedly given to Mc Millan by LA VECCHIA. (A 81)

Following the discovery of the counterfeit money at Penn Station, Kramer signalled his brother agents to arrest LA VECCHIA. (A 82) According to Kramer, at the moment the arrest order was transmitted, LA VECCHIA left the store and walked a distance away to his automobile. Minutes later, when

LA VECCHIA returned to the store, he was arrested. (A 85 - 86) In addition to this factual account, the Government was permitted to elicit, over objection, Kramer's "expert opinion" that vendors of counterfeit commonly possess more of the contraband than the specific purchase order. (A 87 - 88)

Special Agent Jeffrey Kierstead, who was one of the agents who received Kramer's instruction to arrest LA VECCHIA, testified that just prior to that signal, LA VECCHIA left the store, proceeded to his automobile and opened the trunk. (A 113) Agent Kierstead conceded that he "couldn't see what he was doing inside." (A 113)

The actual search of the vehicle was conducted by Agent Dalton Mc Intosh. Mc Intosh, immediately subsequent to LA VECCHIA's arrest, was given the car keys by an Agent Crovatto one of his supervisors. (A 122) With keys in hand, Mc Intosh went to the vehicle, searched it and took the pre-recorded genuine currency from the trunk. (A 122) Mc Intosh's testimony was followed by Dennis Satterlee, the Secret Service agent who arrested LA VECCHIA and obtained the car keys from his person. (A 136) Additionally, some three to four thousand

dollars in genuine currency was found in LA VECCHIA's possession. (A 136)[12]

The evidentiary hearing concluded with the testimony of Agent John Simon, who was assigned to surveillance of the East 18th Street area on February 15th. (A 142 - 143) Although Simon saw BOGAN and LA VECCHIA together for a brief period on that afternoon, nothing was seen to pass from one Appellant to the other. (A 145)

After the conslusion of Agent Simon's testimony, a number of stipulations were entered into between counsel for the defense and counsel for the Government in order to facilitate the hearing. It was stipulated that a search warrant was neither issued or applied for prior to the search of the Appellant's automobile. Second, it was stipulated that the vehicle was not seized pursuant to the authority of Title 49, United States Code, Section 782. Third, it was stipulated that the Appellant, LA VECCHIA, did not consent to the search of the vehicle. Fourth, and perhaps most significantly,

[12] These monies were unrelated to any claim of wrongdoing.

counsel stipulated that following the arrest of LA VECCHIA and the search of the vehicle, a search warrant for the premises at 270 Lafayette Street was successfully applied for. (A 148 - 149)

In oral argument on the Motion to suppress, the Government relied heavily on this Court's decision in UNITED STATES v. FRANCOLINO, 367 F.2d 1013 (2nd Cir., 1966). In his oral Order denying the Motion to suppress the product of the car search, the Trial Court placed reliance on both the FRANCOLINO case and CHAMBERS v. MARONEY, 399 U.S. 42 (1970). (A 173) Appellants herein respectfully submit that the Court's brief opinion, which merely recognized a "constitutional difference between houses and cars" was an oversimplification of the problem and further, that neither FRANCOLINO nor CHAMBERS can salvage this Constitutionally unreasonable search.

THE FRANCOLINO DOCTRINE

At first glance, UNITED STATES v. FRANCOLINO (SUPRA) is attractively in point for the Government. However, a more detailed analysis would indicate that there is now a shadow of uncertainty cast upon the FRANCOLINO holding and moreover, even accepting FRANCOLINO as the law in this Circuit, it is

wholly inapplicable to the case at bar.

In FRANCOLINO, Judge Friendly, writing for the majority, stated that the federal forfeiture statute, Title 49, United States Code, Sections 781-784, authorized the warrantless search there under consideration. The Court adopted the rule that:

> "...a vehicle reasonably believed to be subject to seizure for having carried or for carrying contraband may be searched without a warrant, even though it was at least as feasible to secure one as was the case here." 367 F.2 at p. 1021.

As previously noted, Judge Friendly's opinion only represented the majority of the Court. In a concurring opinion, Chief Judge Kaufman excepted to this alternative basis of upholding the search. In light of CHIMEL v. STATE OF CALIFORNIA, 395 U.S. 752 (1969), this opinion would now constitute a dissent. Although FRANCOLINO has received support in other Circuits, UNITED STATES v. WHITE, 488 F.2d 563 (6th Cir., 1973); DAVIDA v. UNITED STATES, 422 F.2d 528 (10th Cir., 1970), there remains some doubt as to the survival of this blanket exception to the warrant requirement. This doubt is highlighted by the fact that in the years since the FRANCOLINO decision, the United States Supreme Court, despite repeated invitation, has

refused to erase the warrant requirement on the mere fact that probable cause was present to search an automobile. COOLIDGE v. NEW HAMPSHIRE, 403 U.S. 443 (1971).

In UNITED STATES v. LEWIS, 303 F.Supp. 1394 (S.D.N.Y., 1969), Judge Frankel, although finding the FRANCOLINO decision "convincing" recognized that it "may be somewhat debatable at higher levels." 303 F.Supp. at p.1396. Another District Court decision which spoke to this issue held that:

> "Before seizing vehicles and other items of derivative contraband, the forfeitable nature of which often depends on the making of delicate judgments about previous facts and circumstances, the agent must first procure a warrant except in those established circumstances where a warrant would not be required to make a search. The circumstances justifying searches, and by analogy seizures, without warrant are set forth in Coolidge v. New Hampshire [citation omitted]."

MELENDEZ v. SHULTZ, 356 F.Supp. 1205, 1210-1211 (D.Mass., 1973). Appellants herein, hoever, do not assume the burden of convincing this Court that FRANCOLINO should be overruled. Instead, it is submitted that for at least two reasons, FRANCOLINO is not here controlling.

Of particular importance in the case at bar is that the automobile in question was never seized pursuant to the authority of Title 49, United States Code, Section 782. Cases, including

FRANCOLINO, which hold that this section constitutes a statutory exception to the warrant requirement, uniformly involve the actual seizure of the automobile. UNITED STATES v. WHITE (SUPRA); DAVIDA v. UNITED STATES (SUPRA); UNITED STATES v. AYRES, 426 F.2d 524 (2nd Cir., 1970). See, also, UNITED STATES v. MAURO, --- F.2d --- (2nd Cir., November 25, 1974) sl.op. p. 483. In Judge Kaufman's concurring opinion in FRANCOLINO, criticism of the majority position rested in part upon the fact that the search of the car "preceded its seizure" and that apparently the seizure statute was a mere pretext to justify the search. Judge Kaufman complained that:

> "The search was not ancillary to a seizure as it would have been had the car been seized, driven to a police garage pending forfeiture, and then searched. Instead, the seizure of the car was incidental - almost an afterthought to the search of the car. To hold the search to be justified because the seizure was justified is to permit the tail to wag the dog." 367 F.2d at p.1023.

In the instant case, the agents apparently threw caution to the wind and did not even bother to exercise an afterthought. To apply the FRANCOLINO doctrine where a seizure is never made would permit the tail to wag a non-existent dog. For

this reason alone, it is submitted, FRANCOLINO does not apply.

Moreover, in FRANCOLINO and the cases which adopt or follow its holding, one essential ingredient in determining whether a warrantless search and seizure was lawful pursuant to the authority of Title 49, United States Code, Section 782 is that there must be probable cause to believe that the vehicle in question transported contraband. A review of this record reveals that such probable cause is conspicuously absent. In the context of the Government's entire case, it must first be noted that this automobile had absolutely no relation to alleged sales of counterfeit until February 15th, 1973. From the evidence developed both at the hearing and at trial, there is nothing to support a reasonable belief that the Chrysler had transported the counterfeit. Indeed, the evidence clearly points to the contrary. It was the Government's theory that the Appellant, BOGAN, placed the counterfeit in the Penn Station locker. Taken in the light most favorable to the Government, the Chrysler automobile was used only to transport LA VECCHIA in his effort to find BOGAN in order to consummate the deal. The Government, therefore, was forced to rely upon the following questions and answers in support of

the agent's belief that the car had or was carrying contraband:

"Q. Based upon your experience, Agent Kramer, in purchasing counterfeit money from other individuals, is it common for an individual who sells counterfeit money to have more than the individual package for which he is prepared to sell?

MR. LA ROSSA: Objection.

THE COURT: Overruled.

THE WITNESS: I would say yes, but I think two reasons: First of all, they might be able to sell you more if they have it available. They'll always push for bigger sales just to really make as much money as possible.

Two, it's a matter of, I guess, transportation. You're dealing with, I guess, a hot item. If you can move it one time rather than two or three times, they prefer to take one chance than the many.

I would answer your question based on some of the buys I've worked in the affirmative. They would have more." (A 88)

This speculative question and equally specualtive answer demonstrates nothing more than a vague suspicion that the car was carrying contraband. This certainly is not tantamount to

probable cause. HENRY v. UNITED STATES, 361 U.S. 98 (1969).[13]

Research has disclosed no case which extends the FRANCOLINO doctrine to the point where mere suspicion, less than reasonable or probable cause that an automobile transported contraband, is sufficient to justify a warrantless search and seizure. In the context of the FRANCOLINO case and Title 49, United States Code, Section 782, it was not a question of whether there was probable cause to believe that evidence or fruits of the crime were present in the automobile, but rather the issue was whether there was probable cause to believe that the automobile had transported contraband. When the latter test is applied, it becomes evident that the FRANCOLINO doctrine cannot justify the instant warrantless search.[14]

[13]It is even questionable whether the agents immediately suspected that the pre-recorded Government monies were in the automobile. When LA VECCHIA was arrested, he had some three to four thousand dollars in legitimate currency on his person and each bill had to be checked to determine whether those were the monies advanced by the Government.

[14]In fact, the Government's transcript of the alleged tape recorded conversation between Mc Millan and LA VECCHIA conclusively shows that it was not LA VECCHIA who actually transported the counterfeit. A portion of the transcript reads as follows:
"LA VECCHIA: Yeah! You'll know what I'll do...I'm going downtown...I'll grab the guy and I'll tell him put it somewhere for me then I take you back there and show you where it is, alright?

MC MILLAN: Alright." (T 597)

THE CARROLL DOCTRINE

In denying Appellants' Motion to suppress the fruits of the warrantless automobile search, the Trial Court, as previously stated, noted "a constitutional difference between houses and cars." (A 173) It is far too late in the development of decisional law addressed to the Fourth Amendment to challenge this well-entrenched principle. Too many cars have passed over the "open highways" of this country since the United States Supreme Court's decision in CARROLL v. UNITED STATES, 267 U.S. 132 (1925) dispensed with the warrant requirement in many instances where an automobile was involved. Repeated and recent pronouncements of the United States Supreme Court on this subject makes it unnecessary to dwell on the historical evolution of this exception to the warrant requirement. BRINEGAR v. UNITED STATES, 338 U.S. 160 (1949); CHAMBERS v. MARONEY (SUPRA);[15] CADY v. DOMBROWSKI, 93 S.Ct. 2523 (1973). The validity of warrantless automobile searches is a problem

[15]Contrary to the Trial Court's assertion, CHAMBERS is not dispositive of the case at bar. That case merely held that where a warrantless search is valid under the CARROLL doctrine, the police may seize the car, remove it to the police station and search it there.

which often presents itself and is one with which this Court has expressed total familiarity. See, e.g., UNITED STATES v. CARNEGLIA, 468 F.2d 1084 (2nd Cir., 1972).

The general principle that automobiles, because of their mobility, may be searched without a warrant in situations where a warrantless search would not be justified if a dwelling or residence were involved, is unquestionably subject to certain limitations. Plainly stated, probable cause alone is insufficient to justify the absence of a warrant simply because an automobile is the proposed subject of the search. Recognizing the inherent exigencies in the nature of the automobile itself, the Government still has the burden to establish that those exigencies, e.g., the mobility factor, were present. In an often quoted passage from COOLIDGE,

> "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." 403 U.S. at p. 462.

As the Sixth Circuit Court of Appeals stated earlier this year:

> "At times, to be sure, the fact that the challenged evidence is located in a motor vehicle may, in conjunction with other circumstances, furnish the exigency that would permit a search

> to be conducted without a warrant. [Citation omitted]. However, the fact that the object sought to be search is a motor vehicle does not, ipso facto, create an exigency. Not every warrantless search of a motor vehicle is valid simply because probable cause may exist."

UNITED STATES v. YOUNG, 489 F.2d 914 (6th Cir., 1974).

It is for this Court, therefore, to examine the circumstances to determine whether this search was Constitutionally reasonable. Initially, it is submitted that the Government did not successfully meet their burden of establishing that the requisite probable cause was present. It has been shown that there was no probable cause that the car had been used to transport the counterfeit. Notwithstanding this assertion, the question is whether there was probable cause to believe that the fruits or evidence of the crime was located in the automobile. Appellant, LA VECCHIA, will concede that after it was discovered that only $50.00 of the marked $2,500 was found on his person, in conjunction with the fact that the agents observed him go to the trunk portion of his automobile minutes before his arrest, provided probable cause that evidence of the crime was in the trunk. However, was this probable cause present prior to the search? The agents testified, as

earlier noted, that LA VECCHIA had some three to four thousand dollars on his person at the time of the arrest. The Government failed to show that prior to the search it was determined that $2,450 in pre-recorded monies were not present. Therefore, the inference may be drawn that the agents searched the car on Kramer's suspicion that additional counterfeit would be discovered which, as stated, did not meet the threshold level of probable cause.

Assuming arguendo, that there was probable cause to search the automobile, it is respectfully submitted that the attendant circumstances did not justify the absence of a warrant.[15] In reviewing these circumstances, the Appellants respectfully ask this Court to consider the following:

First, this was not a situation where law enforcement authorities stumbled upon a crime in progress. The alleged purchase of counterfeit through a Government informant was a professional and expertly executed operation. The limited

[15]This assumption of probable cause, for the sake of argument, refers only to a reasonable belief that the fruits or evidence of the crime might have been contained in the automobile. This is not to be confused with probable cause that the vehicle had transported counterfeit currency, UNITED STATES v. FRANCOLINO (SUPRA), a supposition which the Appellants will in no manner concede.

participation of many of the agents who testified both at the hearing and at trial, indicates that manpower was plentiful and that all suspects had been apprehended. Secondly, there is no need to speculate about the availability of a federal magistrate and the practicality of obtaining a search warrant for the automobile. Minutes after the arrest, a detail of agents successfully applied to a federal magistrate for a warrant to search the premises at 270 Lafayette Street. Third, the car which at the time of the search had no occupants, was parked and could easily have been kept under surveillance until the agents returned with two search warrants rather than one. The facts, therefore, show that the warrantless search of the automobile was not attributable to exigent circumstances but rather to the overzealousness of the agents who made their own determination as to the reasonableness of the search.

This Court's decision in UNITED STATES v. ELLIS, 461 F.2d 962 (2nd Cir., 1972) provides a useful standard of comparison in determining whether the instant search failed Fourth Amendment standards. In ELLIS, Detective Tricarico searched the automobile in question while two robbers were still at large. This Court reasoned that the opportunity to search the automobile, even though it had not been in motion, was fleeting

and that the suspects could have driven away in that car had the officer abandoned his efforts. Special note was also made of the impracticality of guarding the automobile "at a time when police manpower was being drained in an attempt to find the two robbers still at large." Moreover, the Court found it "significant" that the police officer was not merely searching for evidence against "suspects already in custody," but rather may have been furiously looking for evidence which might have aided in the apprehension of the criminals. These facts are diametrically opposed to those at bar. Here, there were no "culprits" at large, nor did the agents evidence any suspicion that there were any other suspects not apprehended. Considering the Secret Service manpower available at the scene, the opportunity to search was not fleeting in any sense of the word. Unlike Detective Tricarico in ELLIS, Agent Mc Intosh was "searching the automobile merely for evidence against suspects already in custody."

The distinctions drawn between ELLIS and the case at bar demonstrate, it is respectfully submitted, that the Appellants have been aggrieved by a Constitutionally unlawful search and seizure. For these reasons, reversal is required.

## POINT III

THE PROOF AT BAR DID NOT ESTABLISH THE SINGLE CONSPIRACY CHARGED IN THE INDICTMENT; THE VARIANCE IN PROOF WAS PREJUDICIAL TO THE APPELLANTS, BOGAN AND LA VECCHIA.

Prior to the conclusion of the summation, Appellants' trial counsel requested that the Court charged the jury that:

> "If you find more than one conspiracy within the conspiracy count, then you have a duty to acquit the defendants on the count of conspiracy." (A 245), 256)

This request was denied and following the charge, specific exception was taken. (A 397) Appellants herein respectfully contend that the proof at trial did not establish a single conspiracy as pleaded in the Indictment. The result of this variance in proof was to cloud the issue of Appellants' involvement, the result of which was to prejudice their right to a fair trial.

Simply stated, Appellants, BOGAN and LA VECCHIA, contend that the evidence, taken in the light most favorable to the Government, established at most that LA VECCHIA and BOGAN had conspired to sell counterfeit to the informant John Mc Millan and that admission of hearsay declarations and transactions

relative to Albert Setford, Albert Evangelista, Dominick Russo, Philip Martino, Benjamin Pankiewicz and the two co-defendants, Kurshenoff and Andriotis, divested the jury's attention from the real issue joined at trial.

In his charge to the jury, the Trial Court instructed that:

> "If you find that there were separate conspiracies in 1971, 1972 and 1973, then what I said about the use of acts and statements of co-conspirators should be modified because statements made in one conspiracy cannot be used against the defendant who is a party only to a different conspiracy. That would mean, for instance, that transactions and statements in 1971 and 1973 could not be used against Mr. Andriotis and Mr. Kurshenoff in connection with the sales to them that were alleged to have been made in the summer of 1972. But with respect to Mr. La Vecchia and Mr. Bogan, you can consider all statements made by persons whom you find were co-conspirators with them during the time when the statements were made or the acts were done." (A 376 - 377)

It is clear from this instruction that the Trial Court viewed the problem as a horizontal conspiracy running broadly across the years pleaded in the Indictment, i.e., June, 1971 through February 15th, 1973. The Court, citing UNITED STATES v. VEGA, 458 F.2d 1234 (2nd Cir., 1972), apparently felt that BOGAN and LA VECCHIA could not be prejudiced since the proof

could support a finding that all of the bills distributed throughout this period had been manufactured by one set of plates found at 270 Lafayette Street. Therefore, in essence, it was BOGAN and LA VECCHIA's conspiracy and the jury was to determine whether the co-defendants and named co-conspirators joined. Appellants herein submit, however, that this view is erroneous and that from a vertical approach, the conspiracy pleaded in the Indictment never existed. By a vertical approach, Appellants mean that considering LA VECCHIA and BOGAN as the alleged source of the counterfeit, there is nothing here to demonstrate that in either 1971, 1972 or 1973 they conspired with the buyers or distributees of the bogus currency. Unlike the usual narcotics case, the success of this venture in no way depended upon the performance of others whose identities BOGAN and LA VECCHIA did not know. UNITED STATES v. ORTEGA-ALVAREZ, --- F.2d --- (2nd Cir., November 8th, 1974), sl.op. p.345. As stated by this Court in UNITED STATES v. BORELLI, 336 F.2d 376 (2nd Cir., 1964):

> "But a sale or purchase scarcely constitutes a sufficient basis for inferring agreement to cooperate with the opposite parties for whatever period they continued to deal

> in this type of contraband, unless some such understanding is evidenced by other conduct which accompanies or supplements the transaction." 336 F.2d at p.384.

In the instant case, there was no evidence of such an understanding. Mc Millan came to LA VECCHIA, according to his testimony, on a sporadic and unsystematic basis over a three-year period. The basis of a conspiracy violation is the agreement. Title 18, United States Code, Section 371. In the instant case, there is no evidence whatsoever that the agreement extended vertically, i.e., down to the buyers and distributees. Considering the hearsay admitted and the detailed accounts of transactions which bore no relation to the Appellants, LA VECCHIA and BOGAN, a single trial of the case in this manner produced the prejudice referred to in VEGA and UNITED STATES v. CALABRO, 467 F.2d 973 (2nd Cir., 1972). For these reasons, the Appellants, LA VECCHIA and BOGAN, were denied their right to a fair trial on the issue of their guilt or innocence and on this basis alone, a new trial should be ordered.

## POINT IV

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT FOR PREMISES LOCATED AT 270 LAFAYETTE STREET WAS INSUFFICIENT; IN ADDITION, THE AFFIDAVIT CONTAINED A MATERIALLY FALSE STATEMENT THEREBY WARRANTING SUPPRESSION OF THE FRUITS OF THE SEARCH AND SEIZURE.

### A. THE AFFIDAVIT IN SUPPORT OF THE WARRANT.

The affidavit of Special Agent Thomas J. Tully, Secret Service, sworn to on February 15th, 1973 (A 21), provides the basis for the determination of the legality of the search warrant.[16] The question, it is submitted, is whether Agent Tully's affidavit spelled out probable cause that the fruits or instrumentalities of the alleged violations in the instant Indictment would be contained in the specified premises. Agent Tully's affidavit can be reduced to the following:

John Mc Millan, the self-confessed counterfeit dealer, informed the special agent that he had purchased counterfeit monies from LA VECCHIA from August of 1971 through September

[16] The Appellants, LA VECCHIA and BOGAN, are presently awaiting trial on similar charges in the Southern District of New York before Judge Stewart. This Motion to suppress was first prosecuted in that Court.

of 1972. He states that these purchases were made in Brooklyn in the neighborhood of LA VECCHIA's residence which he had visited.

Thereafter, Mc Millan, equipped with an electronic transmitter, met with LA VECCHIA at 125 East 18th Street. LA VECCHIA, it is alleged, then left 125 East 18th Street and drove to 270 Lafayette Street, entered the building and left some ten or fifteen minutes later. Nowhere is it contained in this affidavit that LA VECCHIA actually went to Beacon Sales and Beacon Printing located in that same building. As a matter of fact, the search warrant itselft indicates that 270 Lafayette Street is a fifteen-story building. After leaving 270 Lafayette Street, LA VECCHIA was then observed meeting with the co-Appellant, BOGAN, on 17th Street and Park Avenue. Thereafter, LA VECCHIA drives back to 125 East 18th Street, picks up Mc Millan, drives Mc Millan to 29th Street and Lexington Avenue, makes a phone call and continues to 23rd Street and Lexington Avenue, whereupon Mc Millan leaves LA VECCHIA's vehicle. Agent Tully's affidavit then alleges that Mc Millan called Special Agent Kramer and accompanied him to a locker in Penn Station which he opened with a key given to him by LA VECCHIA. The

locker allegedly contained counterfeit money for which Mc Millan informed Kramer he had paid $2,500 in Government pre-recorded funds.

The only other factor set forth in the affidavit was that the Appellant, BOGAN, was arrested on the premises of Beacon Discount Sales, 270 Lafayette Street and during the arrest, the agents observed offset printing presses and printing paraphernalia. These facts, according to Agent Tully, had been substantially corroborated. Based upon this information, and this information alone, the agent concluded that within the premises searched there would be located

> "...counterfeit Federal Reserve Notes, United States Postage Stamps and plates, negatives and other paraphrenalia (sic) for making of such counterfeit notes and stamps which are designed or intended for use and or have been used as the means of committing a criminal offense, to wit, violations of Title 18, United States Code, Sections 471, 472, 473, 474, 476 and 477."

These facts leave little question but that there was absolutely no probable cause that the fruits or instrumentalities of the alleged violations set forth in the instant Indictment would be found at the premises searched. Assuming arguendo, that there was probable cause to believe that the Appellant,

ANTHONY LA VECCHIA, was involved in the violations alleged, there was absolutely nothing to indicate that on February 15th, 1973, evidence pertaining to the crimes could be found at the specified premises. This, it is submitted, is the applicable standard in the determination of whether probable cause existed. DYKE v. TAYLOR IMPLEMENT MFG. CO., 391 U.S. 216 (1968).

The situation which exists here is the agents were led to believe that the Appellant, LA VECCHIA, and others had participated in a crime and then submitted to the Magistrate what can be described as no more than a suspicion that evidence of that crime was within the premises searched. It is fundamental that suspicion can never suffice as probable cause. HENRY v. UNITED STATES (SUPRA). Nowhere do we find the underlying circumstances from which the Magistrate could conclude that there was a reasonable basis to believe that evidence was present on those premises. AGUILAR v. STATE OF TEXAS, 378 U.S. 108 (1964); SPINELLI v. UNITED STATES, 393 U.S. 410 (1969).

B. THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED ON THE BASIS OF A MATERIAL STATEMENT IN THE AFFIDAVIT.

As is now clear, the informant Mc Millan's alleged dealings in counterfeit from 1971 through 1973 were with the Appellant,

LA VECCHIA, alone and there is no evidence of direct contact with the Appellant, BOGAN. In order to obtain a search warrant to search BOGAN's printing establishment at 270 Lafayette Street, it was, of course, incumbent upon the agents to sufficiently connect the Appellant, BOGAN, to the Appellant, LA VECCHIA. With regard to this effort, the following was submitted to the issuing Magistrate:

> "Subsequently, investigation was initiated by the affiant and other agents operating at his direction and a review of the file of Dun & Bradstreet, Inc., New York, New York, revealed that Anthony La Vecchia, was, in fact, d/b/a Beacon Discount Sales at 270 Lafayette Street and at 125 East 18th Street in partnership with Edward Bogan and that Bogan and La Vecchia also operate Beacon Printing at 270 Lafayette Street."

When the Motion to suppress was brought before Judge Stewart in the Southern District, it was claimed that this material fact was false and that the Dun & Bradstreet reports indicate that only the Appellant, BOGAN, owned this business. (Judge Stewart's opinion, A - 174) At a hearing prior to the beginning of the instant trial, Agent Tully, the affiant, was called to the stand and admitted that this fact was not true. (A 56) The Court, however, as did Judge Stewart, concluded

that the false statement was immaterial. It is here submitted, however, that unlike the case of UNITED STATES v. GONZALEZ, 488 F.2d 833 (2nd Cir., 1973), the misstatement is material. At the time this information was presented to the Federal Magistrate, the Dun & Bradstreet report provided important evidence of a tangible connection between LA VECCHIA and BOGAN. One need not speculate to infer that the Magistrate placed heavy reliance on this statement. In the context of this case, it would be almost absurd to attribute the inclusion of this statement to negligence or neglect. There was nothing in the Dun & Bradstreet report to misinterpret; therefore, one can only conclude that the insertion of this fact was deliberate. For these reasons, the misstatement should have provided a basis for suppression.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the convictions of the Appellants, ANTHONY LA VECCHIA and

EDWARD BOGAN, should be reversed and the Indictment dismissed, or in the alternative, that the case be remanded to the District Court for a new trial.

Respectfully submitted,

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